United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1221

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1221

UNITED STATES OF AMERICA,

Appellee,

—vs.—

CHARLES LUCCHETTI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

HENRY J. BOITEL
Attorney for Appellant
Charles Lucchetti
233 Broadway
New York, New York 10007
(212) RE 2-8104

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Charles Lucchetti petitions the Court for rehearing (F.R.A.P., Rule 40) and suggests rehearing en banc (F.R.A.P., Rule 35) with respect to this Court's opinion of March 4, 1976, affirming his criminal conviction (slip sheet ops., at p. 2351; Sept. Term, 1975), upon the following grounds:

A. This case presents several important issues of first impression involving substantial policy determinations with respect to the proper administration of justice in the Federal system;

B. Moreover, in applying the aforementioned policy determinations, the Panel failed to mention, and apparently overlooked or misunderstood, several critical facts;

C. The Panel either erroneously disregarded or overlooked the bearing of prosecutorial suppression of evidence upon a defendant's right to a prompt disposition and a speedy trial, an issue specifically and individually raised as Point VIII of appellant's brief.

Questions Presented for Rehearing and Suggested as Meriting Rehearing En Banc

1. Where a prosecutor and his chief investigator knew or should have known that they committed reversible error at the defendant's first trial by suppressing evidence, and where, after trial, they have been alerted by the defendant that he is searching for evidence of such suppression, but they do not inform him of it, may subsequent admissions made by him in the hope of reducing his sentence be used against him at his retrial which was ordered as a result of the discovery of such suppressed evidence? In short, should the defendant's admissions be excluded as being the fruit of prosecutorial suppression of evidence?

2. Where a prosecutor utterly fails to fulfill his promise to a convicted and sentenced defendant that if the defendant cooperates his cooperation will be made known to the sentencing judge and to the parole board, may the prosecutor, nevertheless, utilize the defendant's admissions, made pursuant to such cooperation, for the purpose of re-convicting the defendant after the prior conviction is vacated? In short, should the prosecution be deprived of the advantage it has reaped as a result of a bargain which it failed to keep?

3. Where, for several years, and with specific knowledge that a defendant is seeking to establish that particular evidence was wrongfully suppressed at his trial, the prosecutor and his chief investigator fail to reveal the fact of such suppression, has the defendant been deprived of a speedy trial and of a prompt disposition when the government seeks to retry him after his conviction has been vacated due to the suppression of the particular evidence in question?

4. Was the defendant deprived of a fair hearing with respect to the admissibility of his admissions due to the demonstrated prejudice of Judge Mishler? Did this Court fail to take into account the fact that Judge Weinstein did not purport to decide the admissibility issues discussed under questions 1 and 2 supra, and that Judge Weinstein did not conduct a hearing de novo with respect to the voluntariness issue, but rather, relied in substantial part upon Judge

Mishler's memorandum of decision, thus infecting Judge Weinstein's determinations?

5. Since, as found by this Court, the trial court violated the unequivocal mandate of 18 U.S.C. § 3501 in failing to place the issue of the voluntariness of the defendant's admissions before the jury, must the judgment of conviction be reversed and is this Court precluded from characterizing the violation as "harmless error"?

Reasons for Granting Rehearing and Rehearing En Banc

I

SINCE THE DEFENDANT'S POST-CONVICTION ADMISSIONS WOULD NOT HAVE BEEN MADE WERE IT NOT FOR THE PROSECUTION'S SUPPRESSION OF EVIDENCE DURING AND AFTER TRIAL, THOSE ADMISSIONS SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE AT THE DEFENDANT'S SUBSEQUENTLY GRANTED RE-TRIAL.

This issue is discussed in our brief on appeal at pp. 25-28, and in the opinion at pp. 2368-2371.

Relying principally on United States v. Edmons, 432 F. 2d 577, 584-5 (2d Cir., 1970), and United States v. Calandra, 414 U.S. 338, 348 (1974), the panel concluded that the defendant's admissions need not be excluded from evidence since: (1) the suppression of evidence at the first trial had not been with the hope of later securing inculpatory evidence (opinion, at 2370), and (2) the grant of a new trial was sufficient to deter such conduct in the

future (opinion, at 2371).

We respectfully urge that these conclusions were erroneous for two reasons.

1. The focus of this Court's opinion is solely upon the prosecutorial suppression of evidence at the trial herein. With respect to that suppression, this Court made clear that "The District Court properly concluded that such a failure [of the government to correct false testimony] necessitated vacating Lucchetti's conviction." (Opinion at 2369). However, the act of suppression did not terminate with the defendant's trial. As made clear by the statement of facts in our brief on appeal, it was only by herculean persistence that Lucchetti was able to set into motion the events which culminated in the disclosure of the suppression.

On June 5, 1972, when Agent Long (the case agent at trial, and a party to the events which were suppressed at trial) interviewed Lucchetti at the Suffolk County Jail, Lucchetti had not yet commenced making any admissions. As noted in the F.B.I. report, during the course of the interview Lucchetti stated that he hoped to be able to prove that Dempsey had lied in his testimony during the trial with respect to the question of whether Assistant United States Attorney Moore had promised leniency to him (A. 138).*

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* References preceded by "A." are to the appellant's appendix filed with respect to the instant appeal.

Long should have recognized his continuing obligation and should have revealed the truth to Lucchetti. He did not do so. Additionally, when, in June, 1972, Moore was advised of the commencement of conversations with Lucchetti, Moore had a similar obligation. He, too, failed to fulfill that obligation.

The Panel's opinion fails to attach any significance to the post-trial suppression of evidence or the distinction between prosecutorial inadvertence at trial (resulting in culpable suppression of evidence as was here found to be the case), and continuing post-trial suppression under circumstances where the suspected suppression is specifically called to the attention of the government. The granting of a new trial may in fact deter the later; however, the refusal to grant a new trial clearly encourages the former. The net result, moreover, undermines the constitutional and policy considerations which require new trials where material evidence has been suppressed at trial.

Since Lucchetti would not have made the admissions were it not for the continued suppression, despite Lucchetti's clear flagging of the issue for the government, those admissions should have been excluded from evidence as being the product of the suppression. In the opinion, this Court noted:

> "It must be remembered that 'the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most

> efficaciously served.' United States v. Calandra, 414 U.S. 338, 348 (1974)." (Opinion, at 2370; bracketed material added).

The only efficacious remedial objective to deter continuing suppression under facts such as those in the present case would be to exclude the defendant's admissions.

2. The Panel cites United States v. Edmons, supra, for the proposition that the exclusionary rule comes into play only when the unconstitutional act of the government is perpetrated with the "hope" of securing the evidence which the defendant later seeks to have excluded (opinion at 2370). Thus, the opinion cites the first sentence of the following extract from Edmons, but does not mention the other comments which we quote:

> "***The government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act. It does not 'exploit' a lineup without counsel if it makes no use of what there occurred and satisfies the court that this has no significant effect on the trial testimony.***" (432 F. 2d 577, 584-5).

It can hardly be claimed that Lucchetti's admissions had no effect on the trial testimony. They admitted his guilt. Indeed, two of the three jury requests for the rereading of testimony or for other information concerned Lucchetti's alleged admissions (W. 656-658).*

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* References preceded by "W." are to the transcript of the trial conducted before Judge Weinstein.

Moreover, the following holding in Edmons fully supports our argument, supra, that the exclusion of Lucchetti's admissions would tend to deter continuing post-trial suppressions:

> "Beyond all this, we are here dealing with Federal convictions. If we did not consider the exclusion of the in-court identifications to be required by the Fourth Amendment, we would have to consider whether we should not bar them in the exercise of our supervisory power. 'A ruling admitting evidence in a criminal trial *** has the necessary effect of legitimatizing the conduct which produced the evidence,'***" (432 F. 2d 577, 585).

We respectfully urge, therefore, that predicating the exclusion of evidence upon some specifically ascertainable "hope" of the prosecutor is not and should not be the rule. If, as was here the case, the prosecutor knew or should have known that false testimony bearing upon credibility of an important prosecution witness had been elicited at trial, then the defendant should not be placed at any disadvantage as a result of the suppression and continuing suppression of such information.

II

SINCE LUCCHETTI'S ADMISSIONS WERE CONCEDEDLY SECURED IN RETURN FOR THE PROSECUTOR'S PROMISE THAT THE SENTENCING JUDGE AND THE PAROLE BOARD WOULD BE ADVISED OF LUCCHETTI'S COOPERATION IN CONNECTION WITH LUCCHETTI'S EFFORTS TO REDUCE THE LENGTH OF HIS INCARCERATION, THE PROSECUTOR'S FAILURE TO KEEP EITHER PROMISE REQUIRED THAT LUCCHETTI'S ADMISSIONS BE EXCLUDED FROM EVIDENCE AT HIS RETRIAL.

This issue is argued in our main brief at pp. 30-32 and is discussed in the Panel's opinion at p. 2367, 2368.

There is absolutely no doubt that, in return for Lucchetti's admissions, Assistant United States Attorney Moore promised that Lucchetti's cooperation would be made known to the trial judge (in connection with a motion for a reduction of sentence) and to the United States Board of Parole (in connection with an application for parole, for which Lucchetti was immediately eligible). Mr. Moore admitted in the Court below that he had never fulfilled either promise to the slightest degree (May 5, 1975, at pp. 139, 150-1, 170; See also: testimony of Agent Long, May 2, 1975, at p. 85).

In rejecting Lucchetti's claim that the failure of Moore to perform required the exclusion of Lucchetti's admissions, the Panel ruled as follows:

> "***Chief Judge Mishler also found, based primarily upon the testimony of Agent Long and Assistant United States Attorney Moore, that Lucchetti's information, with the exception of the return of the money

> by his wife, had been essentially uncorroborated and valueless, and concluded that Lucchetti was not in a position to invoke the agreement. United States v. Nathan, 476 F. 2d 456, 459 (2d Cir., 1973), cert den. 414 U.S. 823. Again, based upon an examination of the record before us, we see no reason to quarrel with those findings." (Opinion, at 2368).

At the outset, it should be noted that Nathan, relied upon by the Court, involved a situation where the defendant "failed to carry out his part of the bargain by refusing to disclose the promised information and hence is in no position to invoke the agreement now." (476 F. 2d at 459; emphasis added). There was no such refusal in the present case.

Moreover, Agent Long's hearing testimony before Judge Mishler made clear that Long believed the information which had been given by Lucchetti had been accurate and truthful (May 2, 1975 at pp. 89, 90-93), in various respects was corroborated by another available witness (Id., at p. 47), and that Lucchetti's information was of value (Id., at pp. 87-8). Although Moore's hearing testimony cast aspersions upon the veracity of Lucchetti's information, Moore completely changed his tune on that subject in his testimony at Lucchetti's subsequent trial in which he admitted that he believed that Lucchetti had given truthful information with respect to allegedly criminal conduct by an attorney (W. 481-2; See: Our brief on appeal at pp. 20-1).

The fact is, as set forth at p. 31 of our main

brief, Lucchetti had provided the government with substantial information concerning the commission of serious crimes, directed the government to another individual who, in fact, corroborated certain of Lucchetti's information, and Lucchetti secured for the government the return of some $8,000.00 which had been the product of a bank robbery in which he, himself, had not been involved since he was incarcerated at the time.

We respectfully, but vigorously, dispute as completely unfounded the conclusion that the extent of Lucchetti's cooperation did not require the government to fulfill its part of the bargain. Since the government dishonored its agreement, Lucchetti should have been placed in the status quo ante by the exclusion of his admissions.

In Santobello v. New York, 404 U.S. 257 (1971), the Court held as follows with respect to promises within the plea bargaining context:

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (404 U.S. at 262).

The same rationale should be applied to the present case. In substance and effect the problem is the same. Moreover, an incarcerated defendant who cooperates with the government

places his personal safety in serious jeopardy. Under these circumstances, a Court should practically impose a reasonable doubt standard before declaring his cooperation "valueless."*

III

JUDGE MISHLER'S DEMONSTRATED PREJUDICE AGAINST THE DEFENDANT REQUIRED THAT THE DEFENSE MOTION FOR A RECUSAL BE GRANTED. THE FAILURE TO GRANT THE MOTION DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW AND RENDERED THE PRETRIAL SUPPRESSION HEARING INVALID.

This issue is discussed at pp. 36-43 of our main brief on appeal, and at pp. 2375-6 of the Panel's opinion.

The opinion cites as evidence of Judge Mishler's lack of prejudice the fact that he granted the defendant a new trial and then granted a mistrial when the prosecutor committed clear prejudicial error. These were questions of law which could not have survived an an appeal if Judge Mishler had acted otherwise. Lucchetti's complaint is with respect to the effect that the alleged prejudice had upon Judge Mishler's factual findings - findings which will rarely be disturbed.

We have set forth the various facts concerning the Judge's bias at pp 36-40 of our main brief on appeal. In view of those facts, the Judge was bound to follow the directive of 28 USC § 455, which provides, in pertinent part:

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*The FBI reports reproduced at A.138 and A.146 make clear that the agents and the prosecutor promised that whatever "cooperation" Lucchetti gave would be made known to the Court and to the Parole Board. No mention of strings. No corroboration requirement. No reference to some undefined "value."

> "(A) Any justice, judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."
> [Emphasis added]

The issue, therefore, was whether Judge Mishler's impartiality "might reasonably be questioned", and appellant respectfully submits that the record facts prior and during the most recent proceedings demonstrate that such a condition existed. The Panel's opinion does not address itself to that issue.

Instead, the Panel's opinion finds that any possible bias on the part of Judge Mishler "was surely dissipated by the transfer of the entire case to Judge Weinstein, who conducted a new suppression hearing before commencing the third trial." (Opinion, at 2376).

As we pointed out in our brief on appeal, at pp. 22-4, Judge Weinstein did not conduct a "new" suppression hearing. He merely supplemented Judge Mishler's hearing on the issue of whether Lucchetti had been subjected to inordinate pressures while at the Suffolk County Jail. He then adopted Judge Mishler's memorandum, apparently without reviewing the testimony that had been taken before Judge Mishler.

That the affirmance in this case depends upon Judge Mishler's findings is best demonstrated by the Panel's opinion in this case which relies upon Judge Mishler's opinion not only with respect to the voluntariness issue (opinion at

2366), but also as to issues not ruled upon by Judge Weinstein, such as the nature and performance of Lucchetti's bargain with the prosecutor (opinion, at 2367-8), and the extent of willfulness involved in the prosecution's suppression of evidence (opinion, at 2369-71).

It is respectfully submitted, therefore, that rehearing should be granted with respect to the questions of whether the record demonstrates prejudice on the part of Judge Mishler, whether Judge Mishler addressed the problem in the manner required by law, and whether the factual underpinnings of this Court's affirmance are predicated upon Judge Mishler's allegedly biased factual findings.

IV

LUCCHETTI WAS DENIED A SPEEDY TRIAL AND A PROMPT DISPOSITION BY VIRTUE OF THE PROSECUTION'S CONTINUING POST-TRIAL SUPPRESSION OF EVIDENCE, THUS ENTITLING HIM TO A DISMISSAL OF THE INDICTMENT, RATHER THAN A NEW TRIAL.

This issue is discussed at pp. 50-1 of our brief on appeal. It is not discussed in the Panel's opinion.

The defendant was arrested in June, 1971, and his first trial commenced in August, 1971. As we now know, that trial was rendered a nullity by virtue of prosecutorial suppression of evidence. The defect was not remedied until December 16, 1974, when Judge Mishler set the prior conviction aside. There was, therefore, a lapse of more than three years for which the government is accountable.

The remedy for the denial of a speedy trial is a dismissal of the charge, Strunk v. United States, 412 U.S. 434 (1973).

In Barker v. Wingo, 407 U.S. 514, 530-534 (1972), the Court made clear that the chief factors to be taken into consideration when determining whether a defendant has been denied his right to a speedy trial are: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In the present case, there is no doubt that the length of delay was extraordinary, the reason for the delay was inexcusable (or the defendant would not have been granted a new trial), the defendant repeatedly asserted his right to be properly tried, and he suffered the prejudice of lengthy incarceration.

With respect to the requirement of prompt disposition, this Court recently noted in United States v. Yagid, - F. 2d - (September Term, 1975; slip sheet ops. at p. 1437)(1976), "***The purpose of all the Plans for Achieving Prompt Disposition of Criminal Cases has been to serve the public interest in the prompt adjudication of criminal cases, and not 'primarily to safeguard defendants' rights." (slip. op., at p. 1445).

Whatever the state of mind of the prosecution staff in the instant case may have been, the prosecution was nevertheless found by Judge Mishler and by this Court to have been guilty of culpable suppression. The lack of motive or

intent was irrelevant. In Yagid, supra, this Court noted, "While there may have been no prosecutorial misconduct here, certainly none of the adminstrative snafus in this case can be charged to the defendant." (Slip op. at pp. 1445-6). A delay of more than ninety days required a reversal in Yagid. In the present case, the delay was more than twelve times as long, was chargeable to the prosecution, and was without the fault of (indeed, despite the efforts of) the defendant.

Under Rule 3 of the Local Plan for Prompt Disposition, the defendant, being incarcerated, was entitled to be tried within ninety days. None of the "excluded periods" set forth in Rule 5 cover the instant situation. Even as to those periods, however, standards of reasonableness and diligence are imposed upon the prosecutor. Whatever else the vacation of the conviction in this case means, it certainly means that the government did not perform its function diligently or reasonably.

Petitioner respectfully submits that his situation falls within the spirit of the Prompt Disposition Plan, and that, in any event, he was denied a speedy trial. For these reasons, the judgment of conviction should be reversed and the indictment should be ordered dismissed.

V

THE FAILURE OF THE DISTRICT COURT TO FOLLOW THE MANDATE OF 18 U.S.C. § 3501 CANNOT BE DEEMED TO HAVE BEEN HARMLESS ERROR.

This issue is discussed at pp. 35-6 of our brief on appeal and in the opinion at pp. 2371-2375.

The opinion herein held that it was error for the trial court to fail to charge the jury with respect to the voluntariness of the defendant's confession and that the jury should give such weight to the confession as the jury felt it deserved under all of the circumstances. Nevertheless, the opinion holds that the error was harmless, despite the unequivocal mandate of 18 U.S.C. § 3501(a).

It is respectfully submitted that in making the finding that the error was harmless, this Court has done precisely what the statute makes clear no judge should do, presumably even judges of Federal appellate courts. It has interposed its judgment as the final determining factor rather than leaving the issue to the jury. Two of the three jury requests during deliberations concerned Lucchetti's alleged admissions (W. 656-8).

We respectfully urge that this Court, upon rehearing, should address itself to the question of whether it has the power to declare the conceded error harmless, bearing in mind that the admissions constituted a confession of guilt.

Conclusion

For all of the above reasons, the petition for rehearing and the suggestion for rehearing en banc ought be granted, and the judgment of conviction should thereafter be reversed.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
Charles Lucchetti

March 18, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, : Docket No. 75-1221

-vs.- : AFFIRMATION OF SERVICE

CHARLES LUCCHETTI, :

Appellant. :

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HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court affirms the following to be true under penalties of perjury, pursuant to Rule 2106 CPLR:

On March 18, 1976 I served two (2) copies of the Petition for Rehearing and Suggestion for Rehearing En Banc in behalf of appellant Charles Lucchetti upon David Trager, Esq., United States Attorney for the Eastern District of New York, Attorney for the United States in this matter at 225 Cadman Plaza East, Brooklyn, New York, by depositing same in a post-paid, properly addressed envelope in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

In addition, I served a copy of the Application to File Enlarged Petition for Rehearing in this matter, along with the Petition.

HENRY J. BOITEL

New York, New York
March 18, 1976